

Title 86 Part 100 Section 100.3120 Allocation of Compensation Paid to Nonresidents (IITA Section 302)
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TITLE 86: REVENUE

**PART 100
INCOME TAX**

Section 100.3120 Allocation of Compensation Paid to Nonresidents (IITA Section 302)

a) In general

- 1) In order for items of compensation paid to an individual who is a nonresident of Illinois at the time of payment to be allocated to Illinois, such compensation must constitute "compensation paid in this State". If the test is met, then all items of such compensation, and all items of deduction directly allocable thereto, are allocated to Illinois under IITA Section 302(a) (except items allocated under IITA Section 301(b)(2), as to which see subsection (c) below). Compensation paid to a nonresident, which is allocated to Illinois, enters into the computation of such individual's net income under IITA Section 202 and is generally subject to withholding under IITA Section 701 (see Sections 100.7000, 100.7010 and 100.7020). The tests for determining whether compensation is paid in Illinois appear in IITA Section 304(a)(2)(B) and are substantially the same as those used to define "employment" in the Illinois Unemployment Compensation Act [820 ILCS 405] (and similar unemployment compensation acts of other states). Compensation is paid in Illinois if:
 - A) The individual's service is localized in Illinois because it is performed entirely within Illinois;
 - B) The individual's service is localized in Illinois although it is performed both within and without Illinois, because the service performed without Illinois is incidental to the individual's service performed within Illinois; or
 - C) The individual's service is not localized in any state but some of the service is performed within Illinois and either:
 - i) the base of operations, or if there is no base of operations, the place from which the service is directed or controlled is within Illinois, or
 - ii) the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in Illinois.

- 2) The foregoing rules are to be applied in such manner that if they were in effect in other states an item of compensation would constitute compensation "paid in" only one state. Thus, if an item would, under these rules, constitute compensation paid in a state other than Illinois because the individual's service was localized in such other state under subsection (a)(1)(B) above, it could not also be compensation paid in Illinois. Pursuant to 50 USC 574, compensation for military or naval service paid to a nonresident does not constitute "compensation paid in" Illinois even though it meets the tests set forth in subsection (a)(1) above. For further discussion of these tests, see Section 100.7010(a), (d), (e) and (f), dealing with withholding.
 - 3) Personal services under personal service contracts for sports performance
 - A) For purposes of subsection (a)(1)(A) above, *beginning with taxable years ending on or after December 31, 1992, for all persons who are members of professional sports teams that are residents of states that impose a comparable tax liability on all persons who are members of professional sports teams that are residents of this State . . . in the case of persons who perform personal services under personal service contracts for sports performance, services by that person at a sporting event taking place in Illinois shall be deemed to be a performance entirely within this State.* (IITA Section 304(a)(2)(B)) The amount of income constituting compensation paid in this State to such person shall be determined by multiplying the person's total compensation for performing such personal services by a fraction, the denominator of which contains the total number of duty days and the numerator of which is the number of duty days in Illinois during the taxable year.
 - B) The income of persons who engage in sports performance in Illinois, but do not perform personal services under personal services contracts of employment, remains apportionable to Illinois. Such income is business income, as defined by IITA Section 1501(a)(1) and Section 100.3010(a) of this Part. Also see IITA Section 304(a) and Section 100.3310 of this Part.
- b) Compensation paid for past service
- 1) A federal law, P.L. 104-95 (4 USC 114), which applies to amounts received after December 31, 1995, limits the power of states to impose income taxation on certain nonresident pension income. This limitation also impacts income received by a nonresident in the form of distributions from many deferred compensation plans. The allocation of distributions to nonresidents from deferred compensation plans which are not governed by that law and which are potentially income taxable in this State is governed by this subsection (b)(1). Where compensation is paid to a nonresident for past service, such compensation will, for the purpose of determining whether and to what extent such compensation is "paid in" Illinois and is allocated to Illinois under IITA Section 302(a), be presumed to have been earned ratably over the employee's last 5 years of service with the employer (or any predecessor or successor of the employer or a parent or subsidiary corporation of the employer), in the absence of clear and convincing evidence that such compensation is properly attributable

to a different period of employment or that it was not earned ratably over the appropriate period of employment. Compensation earned in each past year will be deemed compensation paid in Illinois if the individual's service in such year met the tests set forth in subsection (a) above. Compensation paid for past service includes amounts paid under deferred compensation agreements where the amount of compensation is unrelated to the amount of service being currently rendered. Amounts paid to nonresidents under deferred compensation agreements may be allocated to Illinois under IITA Section 302(a) in accordance with this paragraph notwithstanding the fact that amounts paid to nonresidents under such agreements will be deemed not to be compensation paid in Illinois for purposes of IITA Section 701 and will not be subject to withholding (see Section 100.7010(g)).

- 2) The standards detailed in the previous subsection may be illustrated by the following examples:
 - A) A is a union member employed by B corporation as a factory worker. During the years 1965-1968, A was employed in B's factory in Illinois; in 1969, A worked in B's factory in State X. In 1970, as a result of union labor contract negotiations, A received a lump-sum payment of \$500 in lieu of a retroactive wage increase. A is at all times a resident of State X. Unless A establishes, by clear and convincing evidence, facts to support a different result, \$100 is deemed to have been earned in each of the 5 years 1965-1969. Further, \$400 is deemed to have been earned by service localized in Illinois and \$100 by service localized in State X (see subsection (a) above). Therefore, \$400 is allocable to Illinois under IITA Section 302(a).
 - B) The facts are the same as in the previous example except that A is able to establish that the \$500 constituted a wage increase retroactive to July 1, 1969. In such case, no part of the \$500 is allocable to Illinois, since it was earned by service in 1969 localized in State X.
 - C) C is a corporate executive. On January 1, 1965, C entered into an agreement with D corporation under which he was to be employed by D in an executive capacity for a period of 5 years. Under the contract C is entitled to a stated annual salary and to additional compensation of \$10,000 for each year, the additional compensation to be credited to a bookkeeping reserve account and deferred, accumulated and paid in annual installments of \$5,000 on C's retirement beginning January 1, 1970. In the event of C's death prior to exhaustion of the account, the balance is to be paid to C's personal representative. C is required to render consultative services to D when called upon after December 31, 1969. During 1970, C is paid \$5,000 while a resident of Florida. The \$5,000 is deemed to have been earned at the rate of \$1,000 in each of the years 1965-1969, since the amount paid is unrelated to C's current consultative services. Whether the \$1,000 earned in each such year is allocable to Illinois under IITA Section 302(a) must be determined by applying the tests set forth in subsection (a) above to each such year.

c) Exceptions to general allocation rules

- 1) While "compensation" may include items of income taken into account by a nonresident employee under the provisions of 26 USC 401 through 424, such as, for example, amounts received by a beneficiary of an employees' trust (taxable to the employee under 26 USC 402, whether the trust is exempt or non-exempt from federal income tax), or income resulting from a disqualifying disposition of stock acquired pursuant to the exercise of a qualified stock option (taxable to the employee under 26 USC 421(b), such compensation is not allocated under IITA Section 302(a). Such compensation is allocated under the rules of IITA Section 301(b)(2)(A), i.e., is not allocated to Illinois, whereas compensation which is allocated pursuant to IITA Section 302(a) is allocated to Illinois, if "paid in" this State (see subsections (a) and (b) above). Consequently, a nonresident claiming that compensation which would otherwise constitute compensation paid in Illinois should not be allocated to Illinois under IITA Section 301(b)(2)(A) must establish that such compensation was properly taken into account by such individual under the provisions of 26 USC 401 through 424.
- 2) Reciprocal exemptions

In any case in which the Director has entered into an agreement with the taxing authorities of another state which imposes a tax on or measured by income to provide that compensation paid in such state to residents of Illinois shall be exempt from such tax, compensation paid in Illinois to residents of such state will not be allocated to Illinois.

- 3) Federal Law. Federal law affects the authority of the State of Illinois to subject certain employees of railroads, motor carriers, merchant mariners, and air carriers to Illinois income taxation, even though in the absence of specific federal provisions those employees would be subject to Illinois taxation by virtue of IITA Section 302(a).
 - A) Railroad employees. 49 USCA 11502(a) provides that no part of the compensation paid by a rail carrier subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of the chapter 105 of Title 49, to an employee who performs regularly assigned duties in more than one state shall be subject to the income tax laws of any state or subdivision of that state, other than the state or subdivision thereof of the employee's residence.
 - B) Motor carrier employees. 49 USCA 14503(a)(1) states that no part of the compensation paid by a motor carrier subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 135 of Title 49, or by a motor private carrier, to an employee who performs regularly assigned duties in 2 or more states as such an employee with respect to a motor vehicle shall be subject to the income tax laws of any state or subdivision of that state, other than the state or subdivision thereof of the employee's residence.

- C) Merchant mariner employees. 46 USCA 11108 provides that no part of the compensation paid by a merchant mariner to an employee who performs his regularly assigned duties in more than one state shall be subject to the income tax laws of any state or subdivision of that state, other than the state or subdivision of the employee's residence.
- D) Air carrier employees. 49 USCA 40116(f)(2) states that no part of the compensation paid by an air carrier to an employee who performs his regularly assigned duties as such an employee on an aircraft in more than one state shall be subject to the income tax laws of any state or subdivision thereof other than the state or subdivision thereof of such employee's residence and the state or subdivision thereof in which such employee earns more than 50% of the compensation paid by the carrier to such employee.

4) The standards set forth in this Section may be illustrated by the following examples:

- A) A is a factory worker for B corporation which is located in Illinois. A resides in State X. When A reaches retirement age, he begins receiving a pension from the exempt trust under B's qualified pension plan. For federal income tax purposes, A properly takes his payments into account under the provisions of 26 USC 402(a). Accordingly, under IITA Section 301(c)(2)(A), A's payments are not allocated to Illinois.
- B) The facts are the same as in the previous example except that B corporation does not fund its employees' pension benefits through the creation of a trust or the purchase of annuities, but pays retired employees each year out of corporate funds. For federal income tax purposes, A is required to take his payments into account under 26 USC 61(a), rather than under 26 USC 401 through 424. Accordingly, allocation of A's pension payments is governed by IITA Section 302(a) above (see subsections (a) and (b) of this Section).
- C) A is a locomotive engineer employed by Interstate railway. Interstate operates a rail yard in East St. Louis, Illinois. Interstate also operates out of St. Louis, Missouri, where it has a rail yard, as well as its administrative and payroll offices. A lives in St. Louis, Missouri. A is assigned to the East St. Louis rail yard and primarily reports to the East St. Louis rail yard of Interstate and drives locomotives for Interstate on trips that go throughout the United States. However, on occasion, A is required to report to the St. Louis, Missouri yard of Interstate and drive locomotives on trips that originate from St. Louis, Missouri. Pursuant to 49 USCA 111502(a), Interstate may only withhold, and A is only subject to, the Missouri personal income tax.
- D) A is an airline pilot for World-Wide Airlines. World-Wide provides passenger and freight service to various destinations throughout the United States from Lambert Field in St. Louis, Missouri, as well as from the municipal airport in Alton, Illinois. A lives in St. Louis, Missouri, but A

reports to and flies out of the World-Wide terminal in Alton, Illinois. A primarily flies to destinations outside of Illinois. Less than 50% of A's compensation (as determined by flight time in Illinois versus flight time everywhere) (see 49 USCA 1512(b)) is earned within Illinois. Therefore, by virtue of 49 USCA 1513(a), A is only subject to Missouri income taxation on his compensation from World-Wide.

- E) The facts are the same as in the previous example, except that A pilots commuter planes between Alton and Chicago, Illinois. In this situation, A will be subject to Illinois income taxation by virtue of the fact that A earns more than 50% of his compensation within the State of Illinois.

(Source: Amended at 25 Ill Reg. 6687, effective May 9, 2001)